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No. 07-1160

In the Supreme Court of the United States

EQUAL ACCESS FOR EL PASO, INC. AND PATRICIA DUARTE MELENDEZ,
Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners seek review of the Fifth Circuit's decision that the Medicaid Act's Equal Access Provision does not confer private rights enforceable in a § 1983 suit. Several factors militate against review: the decision below is interlocutory; no true circuit conflict exists; the Court recently denied review on this issue; and Petitioners' standing is questionable. Moreover, the Fifth Circuit correctly concluded that, under the test set out in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Equal Access Provision does not create private rights—joining the four other circuits that have issued precedential decisions on this matter since *Gonzaga* was decided.

STATEMENT

1. Respondent incorporates by reference the statement of facts contained in the Fifth Circuit's opinion. Pet. App. 3a-7a.

2. Although Petitioners correctly describe the proceedings leading to the court of appeals's decision, Pet. 11-15, they omit subsequent developments below that bear on the Court's consideration of the petition. After the Fifth Circuit rendered its interlocutory decision, Petitioners did not ask that court to stay its mandate, which issued on January 3, 2008. On the same day, in accordance with the mandate, the district court rendered a final judgment dismissing the entire case with prejudice. *Equal Access for El Paso, Inc. v. Hawkins*, No. EP-03-CA-0440-PRM, slip. op. at 2 (W.D. Tex. Jan. 3, 2008). On February 1, 2008, Petitioner Equal Access for El Paso filed a notice of appeal from the final judgment. That appeal is currently pending in the Fifth Circuit. *Equal Access for El Paso, Inc. v. Hawkins*, No. 08-50144 (5th Cir. docketed Feb. 11, 2008). Briefing was completed on July 14, 2008, and the parties are waiting for the court of appeals to set oral argument or decide the case on the briefs.

ARGUMENT

The petition for a writ of certiorari should be denied for four reasons. First, because the district court has already rendered a final judgment in this case, and that judgment is now being appealed, further review of the Fifth Circuit's interlocutory decision is unwarranted. Second, there is no circuit conflict that merits review – the lone circuit decision that purportedly conflicts with the Fifth Circuit's decision is no longer precedential because it was vacated

by this Court; and the Court recently denied a petition asserting the same alleged conflict. Third, uncertainty regarding Petitioners' alleged standing interposes a potential jurisdictional barrier to the Court's review. Fourth, the Fifth Circuit's decision is correct.

1. Petitioners seek review of the Fifth Circuit's interlocutory decision that the Equal Access Provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), does not create private rights enforceable by Medicaid recipients in a suit brought under 42 U.S.C. § 1983. *See* Pet. i; Pet. App. 14a. The Court generally declines to exercise its certiorari jurisdiction to review interlocutory decisions. *See Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970); *compare Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), *with United States v. Virginia*, 518 U.S. 515 (1996) (review granted after final judgment). And none of the "extraordinary" circumstances warranting interlocutory review is present here. *Hamilton-Brown Shoe*, 240 U.S. at 258. Review at this stage would not, for example, relieve a party from the burden of a preliminary injunction or a future trial that conflicts with sovereign immunity. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964). Accordingly, the Court should deny the petition.

The Court's customary forbearance in reviewing interlocutory decisions is especially warranted here because this case has already proceeded to final judgment. The purpose of an interlocutory appeal under 28 U.S.C. § 1292(b) is to obtain an immediate resolution of a

"controlling question of law" that may "materially advance the ultimate termination of the litigation." That purpose has been fully realized here. The Fifth Circuit accepted a § 1292(b) interlocutory appeal on the viability of Petitioners' equal-access claim and held that Petitioners did not have such a cause of action. Pet. App. 7a, 14a. On remand, the district court rendered a final judgment dismissing all of Petitioners' claims with prejudice. *Equal Access for El Paso*, No. EP-03-CA-0440-PRM, slip. op. at 2. Thus, further interlocutory review of the Equal Access Provision issue will not "materially advance the ultimate termination of the litigation" in the district court because the litigation has already terminated. Petitioners' recourse was to renew their argument about the Equal Access Provision on appeal from the final judgment and, assuming that the Fifth Circuit would follow its earlier decision as law of the case, to *then* seek certiorari review from this Court. *See Hamilton-Brown Shoe*, 240 U.S. at 258 (noting that, on certiorari review of a final judgment, the Court can address the court of appeals's prior interlocutory decisions in the same case).[1]

Moreover, the fact that Petitioner Equal Access for El Paso's appeal from the final judgment is now in progress

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1. Petitioners may well have waived any complaint about their equal-access claim on appeal from the final judgment. Equal Access for El Paso did not raise dismissal of this claim as an issue in its appellant's brief. Brief of Appellant at xii, *Equal Access for El Paso, Inc. v. Hawkins*, No. 08-50144 (5th Cir. filed Apr. 18, 2008). And Melendez did not even appeal the final judgment. But that waiver should not temper the Court's general reluctance to review interlocutory decisions. A party cannot unilaterally render an interlocutory order final in this Court by failing to preserve the issue in a concurrent appeal from the final judgment in the same case.

further counsels against certiorari review at this time. If the Court grants the petition, the district court's final judgment will be before the Fifth Circuit at the same time that the Fifth Circuit's ruling on the Equal Access Provision would be before this Court, leading to the inefficient and awkward scenario of both this Court and the Fifth Circuit considering the same case at the same time. And if the result of the Court's ruling were reversal of the Fifth Circuit's interlocutory decision and remand to the district court for further proceedings on Petitioners' equal-access claim, that would likely occur when the pending appeal from the final judgment is still before the Fifth Circuit. In that circumstance, the district court would lack jurisdiction to comply with the Court's mandate on remand. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). This sort of confusion and piecemeal judicial review is precisely what the Court's usual practice of declining review of interlocutory decisions is designed to avoid. Consistent with that practice, the Court should deny the petition.

2. There is no conflict in the circuits that warrants review. Petitioners argue that the Fifth Circuit's decision conflicts with the Eighth Circuit's decision in *Pediatric Specialty Care, Inc. v. Arkansas Department of Human Services*, 443 F.3d 1005 (8th Cir. 2006) (*Pediatric III*), *vacated in part on other grounds sub nom. Selig v. Pediatric Specialty Care, Inc.*, 127 S. Ct. 3000 (2007). Pet. 19-22. But *Pediatric III* does not present a conflict because, in the Eighth Circuit, a decision that has been vacated—even on other grounds—has no precedential

effect.[2] *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575 n.2 (8th Cir. 2002). Thus, the Eighth Circuit is free to revisit this issue in another case.[3]

Even if the Court considers *Pediatric III* in assessing circuit law on this issue, review is still not warranted. As Petitioners acknowledge, Pet. 22, any disagreement tilts heavily in the Fifth Circuit's favor: in contrast to the Eighth Circuit's now-vacated decision in *Pediatric III*, five other circuits hold that, under *Gonzaga*, the Equal Access Provision does not confer private rights enforceable under § 1983. *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 704 (5th Cir. 2007) (Pet. App. 14a); *Mandy R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006); *Westside*

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2. The vacated portion of *Pediatric III* includes the court's holding on the Equal Access Provision. That holding was part of the court's analysis of two defendants' qualified-immunity defenses. 443 F.3d at 1012-16. This Court vacated the judgment against those defendants and remanded the case with instructions to dismiss the appeal as to those claims as moot. 127 S. Ct. at 3000.

3. As the *Pediatric III* panel noted, the Eighth Circuit had previously held that the Equal Access Provision conferred a private federal right on Medicaid recipients. *Pediatric III*, 443 F.3d at 1014 (citing *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 930 (8th Cir. 2004) (*Pediatric II*), and *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993)). Petitioners do not rely on those earlier decisions as the source of a circuit conflict—and with good reason. Neither *Pediatric II* nor *Arkansas Medical Society* analyzed the issue under the test announced in *Gonzaga*—the same test that prompted the Fifth Circuit to reverse course in this case. *See Pediatric II*, 364 F.3d at 930; *Ark. Med. Soc'y*, 6 F.3d at 528. Because the Eighth Circuit's earlier decisions on this issue have been overtaken by *Gonzaga*, they also do not conflict with the Fifth Circuit's decision applying *Gonzaga* to hold that the Equal Access Provision fails to confer an individually enforceable federal right.

Mothers v. Olszewski, 454 F.3d 532, 542-43 (6th Cir. 2006); *Sanchez v. Johnson*, 416 F.3d 1051, 1059 (9th Cir. 2005); *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57 (1st Cir. 2004) (providers have no private rights). Moreover, since the Eighth Circuit decided *Pediatric III*, the Court has denied review of this very question. *Okla. Chapter of Am. Acad. of Pediatrics (OKAAP) v. Fogarty*, 128 S. Ct. 68 (2007) (mem.).[4] In the ten months since that denial, there have been no developments that have transformed this issue into one that merits the Court's review.

3. There is also a potential jurisdictional barrier to the Court's review of the question presented in this case: standing. Even if the Equal Access Provision could be construed as creating a federal right enforceable by some plaintiff under § 1983, such a plaintiff still must advance a theory that fits within Article III's constraints. To have constitutional standing, a plaintiff must plead and prove three elements: an injury-in-fact, causation, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). As explained below, Petitioners' claim does not satisfy the latter two requirements.

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4. The relevant question presented in *OKAAP* was: "Does the 'equal access' requirement of the federal Medicaid statute[,] 42 U.S.C § 1396a(a)(30)(A)—that payment for care and services under a state medical assistance plan must be 'sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area'—confer enforceable rights on children enrolled in the Medicaid program?" Petition for Writ of Certiorari at i, *OKAAP*, 128 S. Ct. 68 (No. 06-1482).

The thrust of Petitioners' case is that Respondent's "setting of deficient reimbursement . . . rates has prevented Medicaid recipients in El Paso from obtaining adequate access to medical services," in violation of the Equal Access Provision. Pet. App. 23a-24a. But this claim hinges in part on El Paso's unique demography—in particular, its relatively high percentage of Medicaid recipients, as captured in a statistic called the "payor mix" (the relative balance among residents covered by Medicaid, uninsured residents, and privately-insured residents). The district court thus summarized Petitioners' theory: "The alleged lack of access to adequate medical services is a result of the fact that inadequate Medicaid payment rates, *when combined with El Paso's unique payor mix*, have created an incentive (1) for physicians to practice in communities other than El Paso and (2) for physicians practicing in El Paso to seek out patients covered by employer-sponsored insurance." *Id.* at 24a (emphasis added).

Because El Paso's payor mix is a critical causal link in Petitioners' claim, it is fatal to their standing in this case. Respondent did not cause this payor mix; it is an "independent factor" that allegedly inhibits Petitioners' access to medical care. *Id.* at 103a n.57. And the remedy that Petitioners seek—an injunction directing Respondent to raise Medicaid reimbursement rates—will not alter the payor mix. Petitioners thus cannot establish causation and redressability under their theory of the case. Without these elements, Petitioners lack constitutional standing. *Steel*, 523 U.S. at 102-03.

The district court considered Petitioners' standing to be a "close question" in light of their admission that their

alleged injuries result in part from El Paso's payor mix—an "independent factor not caused by [Respondent's] conduct." Pet. App. 103a n.57. Indeed, that court found Petitioners' standing to be sufficiently debatable to certify the issue for interlocutory review. *Ibid.* And although the Fifth Circuit concluded that Petitioners had standing, it failed to address the payor-mix factor that gave the district court pause. *Id.* at 7a-8a n.5.[5]

Standing thus presents a substantial jurisdictional question that the Court would have to confront before considering the merits of Petitioners' claim. The existence of this jurisdictional issue provides an additional reason why this case is a poor vehicle to address the question that Petitioners ask the Court to resolve.

4. Regardless, the Court should deny review because the Fifth Circuit's decision is substantively correct. The

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5 The Fifth Circuit misplaced reliance on two sources for its standing analysis. First, it cited several district-court decisions as recognizing "the direct connection between Medicaid recipients' access to medical care and services and low reimbursement rates." Pet. App. 7a-8a n.5. But those decisions necessarily did not address Petitioners' particular theory of causation, which turns on El Paso's unique payor mix. Second, the court took judicial notice of a statement in the Texas Medicaid budget that "[r]ate increases for physicians would promote access to care for Medicaid clients that would likely erode without the increase." *Id.* at 8a n.5 (citation and internal quotation marks omitted). This excerpt appears in a description of a study of *national* trends in Medicaid participation that reached the unremarkable conclusion that raising rates might entice higher aggregate provider participation. The passage does not show that a judicial decree ordering higher reimbursement rates would overcome the structural issue unique to El Paso—the payor mix—that Petitioners contend leads to an overall shortage of doctors and specialists in the area.

court of appeals correctly applied the test set forth in *Gonzaga* in holding that the Equal Access Provision does not create private rights enforceable in a § 1983 suit.

In *Gonzaga*, the Court emphasized that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under [§ 1983]." 536 U.S. at 274. Whether a statute creates such an "unambiguously conferred right," *id.*, at 283, depends on several factors: (1) whether the text contains "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights," *id.* at 287 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)); (2) whether the statute "speak[s] only in terms of institutional policy and practice, not individual instances," *id.* at 288; and (3) whether the statute has "an 'aggregate' focus [and is] not concerned with 'whether the needs of any particular person have been satisfied,'" *id.* (quoting *Blessing v. Freestone*, 520 U.S. 329, 343-44 (1997)).

The Fifth Circuit faithfully applied these principles in this case. The Equal Access Provision reads:

> A State plan . . . must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . to assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

42 U.S.C. § 1396a(a)(30)(A). As the Fifth Circuit explained, Pet. App. 12a-14a, this text displays none of the factors that *Gonzaga* identified as establishing rights.

First, the statute lacks the requisite "rights-creating" language. *See* Pet. App. 12a. It does not discuss what "rights" any individual Medicaid recipient might possess. Instead, far from singling out recipients as having some sort of individual right, the statute does not mention them at all—not even as a class. There is no textual basis to conclude that Congress meant to bestow a federal *right* rather than merely a benefit.

Second, the statutory requirement is written in terms of the "methods and procedures relating to the utilization of, and the payment for, care and services," not any particular individual's access to health care. 42 U.S.C. § 1396a(a)(30)(A). The statute thus concerns "institutional policy and practice" rather than individual outcomes. Pet. App. 13a.

Third, by using the benchmark of health care available to "the general population in the geographic area," 42 U.S.C. § 1396a(a)(30)(A), the statute "has an 'aggregate' rather than an individualized focus." Pet. App. 13a. As the Sixth Circuit similarly concluded, the statute is "'simply a yardstick for the Secretary to measure the *systemwide* performance of a State's [Medicaid] program.'" *Westside Mothers*, 454 F.3d at 543 (quoting *Blessing*, 520 U.S. at 343).

This straightforward application of *Gonzaga* to the Equal Access Provision—confirmed by five circuit courts—requires no further review.[6]

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6 Petitioners also suggest that a different outcome is dictated by the Court's decision in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) because (1) *Wilder* found that a "virtually identical" provision in the Medicaid Act conferred private rights enforceable

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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under § 1983; and (2) *Gonzaga* expressly did not overrule *Wilder*. Pet 38-42. While it is true that the Court did not "overrule" *Wilder*, it had no need to do so because *Gonzaga* recasts *Wilder* in a way consistent with the new test. *See Gonzaga*, 536 U.S. at 280. As the Tenth Circuit has explained: "Although professing not to overrule *Wilder*, *Gonzaga* recharacterized the earlier decision as a case finding an enforceable private right in a 'provision [that] required State to pay an "objective" monetary entitlement to individual health care providers.'" *Mandy R.*, 164 F.3d at 1147 (quoting *Gonzaga*, 536 U.S. at 280). That description certainly does not fit the Equal Access Provision, which does not mention recipients directly and speaks in terms of the "methods and procedures" to be adopted rather than any individual's personal right to access particular medical care. 42 U.S.C. § 1396a(a)(30)(A).

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